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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2594 of 2004
WITH
CIVIL APPLICATION No 5850 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH Sd/-
and
HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

I C TEXTILES LIMITED

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 2594 of 2004
MR RS SANJANWALA for Petitioner No. 1
MR SN SHELAT, ADVOCATE GENERAL WITH MR.SIRAJ GORI,
ASSISTANT GOVERNMENT PLEADER for Respondent No. 1-4
RULE SERVED for Respondent No. 1-4

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 26/11/2004

CAV JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1 The petitioner is a Company incorporated and registered under the provisions of the Companies Act,1956. This petition has been preferred under Article 226 of the Constitution of India praying for the following reliefs :

(a) YOUR LORDSHIPS may be pleased to issue writ of mandamus and/or any other writ, direction or order directing the respondents to consider the petitioners' application for grant of status of prestigious unit to the petitioners under the Government Resolution No.INC/1095/2000(3)/1 (Annexure-B to this petition) and to grant status of prestigious unit under the said Scheme to the petitioners and YOUR LORDSHIPS may be pleased to direct the respondents to take all necessary certificates under the said scheme as would enable the petitioners to avail sales tax exemption under the said scheme for the period from 26.12.2001 up to 26.12.2006.

(b) YOUR LORDSHIPS may be pleased to issue writ of mandamus and/or any other writ, direction or order to the respondents directing them not to initiate any proceedings for assessment and recovery of sales tax dues from the petitioners for the period from 26.12.2001 up to 26.12.2006 under the provisions of the Sales Tax Act;

(c) YOUR LORDSHIPS may be pleased to issue writ of certiorari and/or any other writ, direction or order quashing and setting aside the orders of attachment dated 12/2/2004 and 17.2.2004 (Annexure 'N' to this petition) issued under the provisions of 48A of the Sales Tax Act,1969 and communication dated 16.1.2004 (Annexure 'O' to this petition) and your lordships may be further pleased to restrain the respondents nos. 3 and 4 from initiating any proceedings for assessment and recovery of Sales Tax

under the provisions of the Sales Tax Act,1969;

(d) Pending hearing and final disposal of this petition, YOUR LORDSHIPS may be pleased to

(i) restrain the respondents from initiating proceedings for assessment and recovery of any amount from the petitioners as sales tax dues under the provisions of Gujarat Sales Tax Act,1969;

(ii) grant stay of implementation, operation, execution and enforcement of the orders of attachment dated 12/2/2004 and 17.2.2004 (Annexure 'N' to this petition) and restrain the respondents from attaching the assets of the petitioners under Section 48A of the Gujarat Sales Tax Act,1969 or otherwise;

(iii) direct the respondents to take all steps necessary to enable the petitioners to avail sales tax exemption for the period from 26.12.2001 up to 26.12.2006.

(E) Such other and further reliefs as may be deemed just and expedient in the facts and circumstances of the case may be granted".

2 According to the petitioner the action of the respondents in not considering the petitioner's case for Status of prestigious unit under the 'Capital Investment Incentive to Premier/Prestigious unit Scheme 1995-2000' (hereinafter referred to as 'the Scheme') and thus not granting prestigious unit status to the petitioner under the Scheme and initiating action for assessment and recovery of sales tax dues under the provisions of Gujarat Sales Tax, 1969, are bad in law.

3 The case of the petitioner has been presented by Mr.R.S.Sanjanwala, learned Advocate for the petitioners. It is submitted that the approach of the respondents in

reading the Scheme as requiring investment of Rs.100 crores or more before a particular point of time or during the operative period of the scheme is not warranted. Inviting attention to various clauses of the Scheme Mr.Sanjanwala submitted that as per definition of 'project cost' status of prestigious unit has to be conferred at the very outset on the basis of projected investment of the unit. That once such status is conferred the unit would be obliged to invest such projected amount or make an investment in excess of Rs.100 crores, but the insistence of the respondents that such investment has to be completed within the operative period of the scheme is not borne out from the provisions of the Scheme. It was further submitted that in the event such an obligation was cast upon the petitioner the Scheme would be rendered meaningless and unworkable. That the petitioner had acted to its detriment on the basis of promise held out by the respondent - State of Gujarat, and in the circumstances, the respondents were obliged to honour their commitment. That it was not the case of the respondents that the petitioners did not fulfill various eligibility criteria set out in the Scheme, and once the petitioner was able to establish that it was eligible unit the relevant clauses of the Scheme had to be liberally construed so as to confer benefit of the Scheme on the petitioner and the interpretation canvassed by the respondent 'State' was not borne out from the provisions of the Scheme.

3.1 Mr.Sanjanwala invited attention to provisions of clause 5(ii), 5(iv), 5(vii), in support of the aforesaid submissions. He also referred to PART-II of the Scheme which deals with Rate of Incentive, Sanctioning Authority, etc. to contend that the phrase 'Eligible Fixed Capital Investment' defined by clause 5(ix) was only for the purpose of working out incentive to which a person would be entitled, provided he fulfills all other criteria. That the respondents were misreading the said definition of 'Eligible Fixed Capital Investment' and linking it up with the outer time limit within which the project investment had to be completed.

4 Mr.S.N.Shelat, learned Advocate General appearing with Mr.Siraj Gori, AGP on behalf of the respondents submitted that admittedly the petitioner had not fulfilled the requirement under the Scheme : that of investing Rs.100 crores before the operative period of the Scheme. That the petitioner had gone into commercial production on 27/12/1996 and accordingly the period of 18 months ended on 26/6/1998. That this was the termini before which the petitioner was required to acquire paid

up eligible assets. That as could be seen from Explanation 1, date of completion of the project was an alternative to the date of going into commercial production, and out of the two whichever was earlier was qualifying termini. That as could be seen from the correspondence annexed with the affidavit-in-reply as well as communication dated 3/9/2002 the petitioner had admitted that it had not made investment by the specified date. The learned Advocate General therefore urged that once it was found that the petitioner had actually not made eligible investment to the tune of Rs.100 crores within the time limit prescribed the petitioner was not entitled to the status of prestigious unit, and that consequential benefit by way of sales tax incentive under the Scheme could not be granted. That in the circumstances the petitioner having invested capital less than Rs.100 crores by the date contemplated, the petitioner became entitled to benefit under the Scheme of Capital Investment (General Scheme) 1995-2000 dated 11/9/1995 and that accordingly the petitioner had been granted sales tax exemption for a period of 5 years commencing from 27.12.1996 and ending on 26/12/2001.

5 During the course of hearing, Mr.Sanjanwala had invited attention to the audited balance sheets filed along with affidavit-in-rejoinder to contend that if capital work-in-progress is taken into consideration, the petitioner had crossed the limit of eligible investment as on 30/9/2000. This submission was met with by the learned Advocate General by inviting attention to the Notes on Accounts in the said balance sheets whereunder it was specifically stated that related pre-operational expenses formed part of the value of the assets capitalised and that expenses incurred on modernisation/debottlenecking/relocation/relining of plant and equipment are capitalised. Thus, according to learned Advocate General the petitioner had in fact not made investment as required but incurred expenses for modernisation or relocation of the existing plant and equipment, that capitalisation of such expenditure was not contemplated under the Scheme considering the object of the Scheme.

5.1 During the course of hearing Mr.Sanjanwala referred to the procedure prescribed for extending date of commercial production under the resolution as well as procedure laid down for granting temporary and permanent prestigious unit registration in support of various submissions made by him. As against that the learned Advocate General had in support of the stand adopted by the respondents invited attention to the definition and

constitution of the sanctioning authority i.e. High Power State Level Committee to submit that the decision taken by the said committee regarding interpretation, dispute or contents of the resolution will be final and binding on the applicant unit.

5.2 According to the petitioner the object of the Scheme for development of backward areas and generating large scale employment opportunities can be attained immeditely the new industrial unit commences commercial production. That the distinction between "Project Cost" and "Eligible Fixed Capital Investment" has to be borne in mind. The term 'Project Cost' takes within its sweep projected investment excluding margin for working capital, but when the actual incentive is to be worked out only eligible fixed capital investment is to be taken as the base and ineligible investment is to be excluded. That once the industrial unit shows that it is otherwise fulfilling the criteria for being considered as a prestigious unit, its status as prestigious unit is fixed once and for all regardless of the actual eligible fixed capital investment within a period of 18 months from the date of commencement of commercial production or the last date of the operative period of the Scheme, whichever is earlier. In other words, the submission is that the said limit is fixed for determination of eligible fixed capital investment and has no relation to the status of the unit which gets ascertained once the new industrial unit is able to establish, on facts, that it fulfills the prescribed criteria. According to Mr.Sanjanwala the emphasis in the Scheme is on the commencement of commercial production within the operative period of the Scheme as opposed to the completion of project. In support of the aforesaid proposition Mr.Sanjanwala placed reliance on clause 6(v) which lays down effective steps for extending date of commercial production, to contend that a unit which cannot commence commercial production would be better placed than the unit which has commenced commercial production during the operative period of the Scheme. Such a anomalous situation which results from reading the Scheme in the manner the respondents interpret should be avoided. That as no period is prescribed in the Scheme benefit under the Scheme should not be denied by importing in the Scheme a condition regarding actual incurring of the project cost within a particular period. The principle of promissory estoppel was also pressed into service in this regard. Mr.Sanjanwala further submitted that 'capital work in progress' shown in the balance sheet is expenditure on capital assets which are in the process of construction or completion. That such expenditure has also to be

taken into consideration for the purpose of determining whether the limit of project cost has been achieved or not within the stipulated period. In support of the said contention reliance was placed on decision of this Court in Cibatul Ltd. Vs. Commissioner of Income Tax, 115 ITR 879 and Supreme Court of India in case of Commissioner of Income Tax Vs.Alcock Ashdown and Co.Ltd. 224 ITR 353. The said decision, though rendered under the Income Tax Act, would equally apply to the facts of the case to determine as to whether capital work in progress is asset acquired for the purpose of the Scheme. It was therefore contended that once capital work in progress is taken into consideration the petitioner would achieve the figure of project cost within the operative period of the scheme and hence the petitioner is entitled to the status of prestigious unit and all consequential benefits like incentive under the Sales Tax Act for a period of 10 years, and that restricting sales tax incentive to a period of 5 years is not warranted being based on incorrect interpretation of the Scheme.

6 In light of the new industrial policy announced by the Government of Gujarat it was found necessary to accelerate development of backward areas of the State and to create large scale employment opportunities. For this purpose the need to increase the total flow of investment to industrial sector with proper development of infrastructure and employment of human resources was also part of the same policy. To achieve the said policy, Government of Gujarat by its Resolution No.INC/1095/2000/(3)/1 dated 11/9/1995 was pleased to introduce scheme known as "Capital Investment Incentive to Premier/Prestigious Unit Scheme 1995-2000". The operative period of the Scheme was from 16/8/1995 to 15/8/2000 i.e. the Scheme was operational for a period of five years.

7 'Prestigious Unit' has been defined under the Scheme to be a new industrial unit wherein the following criteria are fulfilled :(a) the minimum project cost has to be Rs.100 crores or more; (b) the unit shall employ atleast 100 workers on permanent basis and shall follow the employment policy of the State Government; (c) such unit has to be set up in eligible area.

7.1 The term 'Project Cost' means the projected investment excluding the margin for working capital.

7.2 The phrase "Eligible Fixed Capital Investment" means investment under four broad heads i.e. (A) Fixed Capital Investment (B) Project related infrastructural

investment, (C) Social infrastructual investment, and (D) Common and Public Purpose infrastructure. Under head (A) Fixed Capital Investment has to be in land, new building, other construction, plant and machinery.

7.3 Under Explanation 1 it is provided that in the case of Project and Project related infrastructure, the proposal shall have to be appraised by a financial institution. The eligible assets acquired and paid for upto 18 months from the date of going into commercial production or upto the date of completion of the project, whichever is earlier, alone will be considered as eligible fixed capital investment, subject to the condition that it will be limited to the appraised cost. Explanation 2 specifies the period during which expenditure incurred for social infrastructure and common and public purpose infrastructure shall be considered to be eligible. However, under Explanation 3 it is stated that no investment made, in fixed capital project related infrastructure, social infrastructure or common infrastructure, after the operative period of the Scheme shall be considered eligible for incentive.

7.4 Definition of "Ineligible Investment" specifies nine different items, but for the present, it is sufficient to take note that Working capital, Preliminary and pre-operative expenses do not qualify for being treated as eligible investment.

7.5 Under PART II the rate of incentive is specified wherein it is stated that the industrial unit will be eligible for incentive according to the location, investment and status under the resolution. The petitioner has admittedly made a claim under the area/category of 'backward' whereunder 80% of eligible fixed capital investment would be available as sales tax exemption.

8 The definition of 'Prestigious Unit' stipulates three criteria which are required to be fulfilled by a new industrial unit or industrial complex. 'New Industrial Unit' has been defined to mean a New Industrial Complex/Project set up by a new undertaking during the operative period of the Scheme, provided it specifies all the following conditions :

"(a) The, new project should have obtained a separate letter of intent/letter of approval or registration or obtained receipt against filing of Industrial Entrepreneurs' Memorandum (IEM) or

registered for the product/s or modification in the existing license as may be required. The creation of additional capacity of the existing product in the same taluka set up by the existing industrial unit shall be considered as an expansion of the project.

(b) The new project should have separately identifiable capital investment. "Separately Identifiable Capital Investment" means it should not have any production linkage with the existing manufacturing process, and should be a separate product in itself with independent marketability. The new unit should be in a separate building, should maintain separate books of accounts and the project should be appraised independently by financial institutions as a viable project. However, the new project will not lose its eligibility, if the utilities of existing units for water, electricity, steam and pollution control facilities are extended to the new project".

9 As can be seen from the aforesaid definition of 'New Industrial Unit' apart from various other conditions a new project should have separately identifiable capital investment. This gives a clue to the interpretation required to be placed on the various clauses of the Scheme. Therefore, what is required is that the new project should have capital investment to the extent specified as one of the criteria for the unit to be declared as prestigious unit. The contention on behalf of the petitioner that for the purpose of ascertaining status of a new industrial unit : as to whether such new industrial unit is entitled to be termed as prestigious unit or not : the situation is to be considered only at the initial stage when projected investment is to be taken into consideration because the actual investment is yet to follow at that stage, cannot be accepted. Submission that there is no time limit prescribed for completing project or achieving the project cost i.e. projected figure of investment is a proposition which is not borne out from overall reading of the Scheme. To hold that Eligible Fixed Capital Investment is to be

taken into consideration only for the purpose of working out incentive and not for any other purpose would mean that the entitlement of the amount on which incentive is to be worked out keeps on fluctuating depending on the amount of investment made from time to time. This cannot be the purpose of the Scheme as it does not provide any certainty. In fact the respondent authorities are required to determine eligibility of a new industrial unit at the initial stage by determining as to whether the prescribed criteria have been fulfilled or not, and thus provisionally registering the new industrial unit in the category that such unit would fall, viz. prestigious or premier unit. Thereafter, it is for such new industrial unit to ensure that it attains the requisite level of fixed capital investment within the period of 18 months from the date of going into commercial production or during the operative period of the Scheme, whichever is earlier. At this stage it is necessary to note that the reliance on behalf of the petitioner on clause 6(B)(v) pertaining to extension of date of commercial production is applicable only in cases of new industrial unit seeking status of premier unit. This becomes abundantly clear when clause 5(v)(a) is taken into consideration. The petitioner therefore cannot take assistance from the said provision in support of its case.

10 The operative period of the Scheme, as already noted hereinbefore, commenced from 16/8/1995 and ended on 15/8/2000. The period for determination of eligible fixed capital investment is upto 18 months from the date of going into commercial production or upto the date of completion of the project, whichever is earlier, as can be seen from Explanation 1. In fact, Explanation 3, which is couched in negative format, stipulates that no investment made, in fixed capital project related infrastructure etc., after the operative period of the scheme shall be considered eligible for incentive. Therefore, to read that for the purpose of determination of eligible investment the outerlimit of the operative period of the scheme is the other termini is also not a correct reading. For the purpose of determination as to which is the eligible fixed capital investment the period during which investment is required to be made is quite categorical when Explanation 1 lays down a period of 18 months from the date of commercial production or upto the date of completion of the project, whichever is earlier. Therefore, to make a purposeful interpretation it is necessary to read the said Explanation as providing for completion of the project within the operative period of the Scheme. To interpret otherwise would mean extending

the operative period of the scheme. Hence, the contention that the project can be completed at any time and no time limit is prescribed does not merit acceptance.

11 The submission that for the purpose of determining the status of new industrial unit actual investment and that too in eligible assets only, is not required, but only projected investment in all types of assets except margin for working capital has to be considered, is also not a proposition which is borne out from reading the Scheme as a whole. It is necessary to bear in mind that for the purpose of inviting investment in specified areas, viz. areas declared to be backward, the State Government is offering various incentives and for purpose of determination of such incentive the Scheme prescribes the basis on which the incentive is to be worked out viz. on fixed capital investment and that too of a new industrial unit. It is not possible to read the Scheme as prescribing two different yardsticks : one for the purpose of determination of status and the other for working out incentive. This becomes absolutely clear when one reads clause 6(i) which prescribes rate of incentive. It is provided that industrial unit will be eligible for incentive according to the location, investment and status under resolution. Therefore, not only the new industrial unit has to be located in the specified area, it has also to achieve the required level of investment as well as status on the basis of criteria prescribed. The incentive has to be worked out on the basis of eligible fixed capital investment and the duration of the period during which such incentive can be availed of is fixed on the basis of the status of the unit. Therefore, the contention that the requirement for project cost is dehors the requirement for ascertainment of eligible fixed capital investment cannot be accepted and goes beyond the provisions of the Scheme.

12 Mr.Sanjanwala is partially right when he submits that capital work in progress should be taken into consideration for the purpose of determining as to whether the required figure of fixed capital investment has been achieved or not; but before such capital work in progress is included, the petitioner will have to establish that such value of capital work in progress does not have as one of the components any ineligible investment. As the facts on record go to show it is an accepted position that the petitioner has vide its communication No.ICTL/DIC/2002 dated 3/9/2002 accepted the position that eligible fixed capital investment in the project is Rs.86.19 crore as per asset verification

carried out by the Department of Industries Commissioner, to whom the said communication is addressed to. After accepting this factual position the petitioner has tried to raise the same issues in the said communication which have been canvassed before the Court. Even otherwise as can be seen from the audited balance-sheets which have come on record, as on 30/9/2000 and subsequently, capital work in progress admittedly includes preoperative expenses as well as modernisation expenses. Therefore, to the extent the capital work in progress includes such capitalised expenditure the same would admittedly not form part of eligible fixed capital investment.

13 In the result, it is not possible to find any infirmity with the action of the respondent authorities in denying status of prestigious unit to the petitioner. Once the petitioner is denied the status of prestigious unit no fault can be found in restricting the sales tax incentive upto the period of five years from the date of commencement of commercial production under the General Scheme. The petition therefore requires to be rejected and is accordingly rejected. Rule discharged with no order as to costs.

CIVIL APPLICATION No. 5850 OF 2004

In view of the fact that the main petition being Special Civil Application No.2594 of 2004 has been disposed of today finally this application has become infructuous and is disposed of accordingly. Rule discharged.

(M.S.Shah,J)

(D.A.Mehta,J)

At this stage, Mr.Sanjanwala requests that the interim relief to the extent of prohibiting coercive recovery may be continued for a further period of six weeks. Mr.S.N.Shelat, learned Advocate General submits that if the interim relief is extended for a reasonable time, the respondents would have no objection. In the circumstances, the respondents shall not take any steps for proceeding with coercive recovery upto 11th January,2005.

(M.S.Shah,J)

(D.A.Mehta,J)
m.m.bhatt